Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-1112

BERNARD GRIZAFFI, LEONARD FALCONE, GRIZAFFI AND FALCONE CONTRACTORS, INC., COLFAX BUILDERS, INC. AND APOLLO ESTATES, INC.,
Petitioners,

vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, RECEIVER OF APOLLO SAVINGS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners, Bernard Grizaffi, Leonard Falcone, Grizaffi and Falcone Contractors, Inc., Colfax Builders, Inc. and Apollo Estates, Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered December 8, 1971, in Case No. 18910, *Ernest Katin, et al.* v. *Apollo Savings, et al.*, and *Federal Savings and Loan Insurance Corporation* v. *Edward P. Kelly, et al.*

OPINIONS BELOW.

The opinion of the District Court for the Northern District of Illinois is reported at 318 F. Supp. 1055 (N. D. Ill., 1970) [*infra*, pp. A-7—A-26]. The opinion of the Court of Appeals is at ..... F. 2d ..... (C. A. 7, 1971) [*infra*, pp. A-1—A-6].

JURISDICTION.

The judgment of the Court of Appeals was entered on December 8, 1971. Jurisdiction is conferred on this Court by 28 U. S. C. Section 1254(1).

QUESTION PRESENTED.

Is a district court vested with jurisdiction in a case brought by the Federal Savings and Loan Insurance Corporation (FSLIC) in its capacity as receiver for a state-chartered savings and loan association pursuant to an administrative appointment by a state official under 12 U. S. C. § 1730(k)(1) which reads as follows:

> (1) Notwithstanding any other provision of law, (A) the Corporation shall be deemed to be an agency of the United States within the meaning of section 451 of Title 28; (B) any civil action, suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in con-

troversy; and (C) the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect: *Provided*, That any action, suit or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States. No attachment or execution shall be issued against the Corporation or its property before final judgment in any action, suit, or proceeding in any court of any State or of the United States or any territory, or any other court.

Did the Court of Appeals err in its expansion of federal jurisdiction under the facts of this case by holding that subsection (B), (C) and the final (proviso) clause apply only to cases of removal from a state court and, therefore, the district court had jurisdiction for the reason alone that the FSLIC is a federal agency?

STATEMENT OF THE CASE.

Background.

On April 26, 1968 the Commissioner of Savings and Loan Associations of Illinois took custody of Apollo Savings under the Illinois Savings and Loan Act (Ill. Rev. Stats., ch. 32, § 848) because Apollo was in serious financial difficulty. Apollo Savings was a savings and loan association chartered by Illinois whose accounts were insured by the Federal Savings and Loan Insurance Corporation ("FSLIC"). A liquidation proceeding under the supervision of the Circuit Court of Cook County was immediately begun under the receivership of a state official. Five months later the state official resigned and the FSLIC was appointed to act as receiver for Apollo (App. 9-10).[1]

The Pleadings.

On May 3, 1968 a complaint was filed in the District Court for the Northern District of Illinois by one Katin and other depositor-shareholders of Apollo charging the association and its directors with fraud and mismanagement under the federal securities laws and at common law. These plaintiffs sought to recover dividends from the date the last dividends were paid to the date each depositor received his principal from the FSLIC and also to recover the uninsured portions of their accounts.

On October 29, 1969 (App. 9) the FSLIC filed a complaint in the district court in which it named four former

1. A copy of the Appendix printed for use in the Court of Appeals will be filed by the Clerk of the Court at the time of the docketing of this Petition. Reference to this Appendix will be "App. ....."

officers of Apollo[2] as defendants in Count I alleging fraud and mismanagement in conspiracy with fifteen other co-conspirators, one of whom was a former officer of Apollo, some of whom were contractors and land developers who had borrowed substantial sums of money from Apollo and others were involved in the sale and leaseback of the headquarters building of the association in Chicago. (App. 9-32)

Count II of the complaint named an alleged major borrower of Apollo and sought damages for the acts alleged in the first, or principal, count of the complaint. Count III likewise incorporated the essential allegations of Count I and named the Petitioners herein, Messrs. Bernard Grizaffi and Leonard Falcone and three of their corporations—Colfax Builders, Inc., Grizaffi and Falcone Contractors, Inc. and Apollo Estates, Inc., as defendants and sought actual and punitive damages against them of about $1,500,000. (App. 34-36)

Counts IV, V and VI sought judgments against a real estate broker and former officers and directors of Apollo. (App. 36-42)

The FSLIC sought and obtained leave on January 5, 1970 to file its first amended complaint which was identical to the original complaint in its allegations of fraud and mismanagement but added one additional defendant (Aetna Casualty and Surety Company) in Count VII and increased the *ad damnum* in Counts I and III. (App. 45)

There were, however, differences between the original and first amended complaints in their allegations of the standing, or capacity, of the FSLIC to bring the action. The jurisdictional paragraph of the original and the amended complaint was as follows (App. 9):

---

2. The defendants Kelly, Baty, Gorman and Svejcar.

JURISDICTION AND VENUE.

1. This action arises under the provisions of 12 U. S. C. § 1725, *et seq.* and 18 U. S. C. §§ 657, 1001, 1006, and 1008. Plaintiff invokes this Court's jurisdiction under the provisions of 12 U. S. C. § 1730(k) and 28 U. S. C. §§ 451, 1331, 1332, and 1345. The matter in controversy, exclusive of interest and costs, exceeds $10,000. Defendants performed the acts complained of in this Count within the Northern District of Illinois, Eastern Division, and plaintiff's claim arose therein.

The description of the plaintiff in the *original* complaint read as follows (App. 46):

2. Plaintiff, Federal Savings and Loan Insurance Corporation (sometimes called "FSLIC" in this complaint) brings this action as a United States Government agency which is the duly appointed receiver for Apollo Savings (Called "Apollo" in this complaint). In the event the order and decree of the Circuit Court of Cook County (under which decree FSLIC acts as receiver of Apollo) should be held invalid, FSLIC brings this action as a United States Government agency which has insured the savings accounts of the depositors in Apollo and has paid said insurance to them. Paragraphs 3 through 9, below, describe Apollo, FSLIC, and the circumstances of the receivership in more detail.

The description of the plaintiff in the *first amended* complaint read as follows (App. 9):

2. Plaintiff, Federal Savings and Loan Insurance Corporation (sometimes called "FSLIC" in this complaint) brings this action as a United States Government agency which is the duly appointed receiver for Apollo Savings (called "Apollo" in this complaint). Plaintiff also brings this action as a *United States Government agency which has insured the savings accounts of the depositors in Apollo, has paid said insurance to them, and has thereby become subrogated to the claims of Apollo's depositors. Paragraphs 3*

through 9, below, describe Apollo, FSLIC, and the circumstances of the receivership in more detail. [Emphasis added.]

Most of the defendants in *FSLIC* v. *Kelly, et al.* filed answers to the first amended complaint and some (e.g., John J. Reynolds, Inc. and Aetna Casualty and Surety Company [Docket Entries of March 13 and 17, 1970, App. 3] filed counterclaims and cross-complaints. The Petitioners herein, however, filed a motion to dismiss the amended complaint (App. 52) on the grounds that it "fails to state a claim for relief against these defendants" and the plaintiff "has no status or standing to seek any relief against these defendants, jointly or severally."

The Settlement Conferences and the Counterclaim Issue.

After the entry of the order of consolidation a pre-trial conference attended by nearly all attorneys was held at which it was "agreed that separate pre-trial conferences would be held with the various parties and the court would work closely with counsel for FSLIC in an attempt to settle each of the many claims presented." (App. 115) Petitioners, through their counsel, held two settlement conferences with the district court to determine whether the claims as to them could be resolved. (App. 102) At that time the Petitioners herein had filed no answer to the amended complaint and, therefore, no counterclaim. However, they advised the court they believed they had a valid and substantial claim against Apollo and would accept $700,000 in settlement of their claim. (App. 117) The court had previously held that Petitioners did not have to file an answer until the end of the plaintiff's case in the event the court ruled against them on their pending motion to dismiss. (App. 65)

The Decision of the District Court.

On September 24, 1970 the district court filed a memorandum opinion and order (*Infra*, pp. A-7 to A-24) which dismissed the *Kelly* case as well as the *Katin* case without prejudice to the right of the plaintiffs to bring the same claims in the Circuit Court of Cook County where the receivership proceedings were pending (*Infra*, pp. A-24 and A-26). The opinion covered the developments in certain pre-trial conferences and held that there was no question that all relief sought could be obtained in the pending receivership proceedings (*Infra*, p. A-15). The district court also held that the ". . . statutes relied on do not grant jurisdiction under the facts of this case. Furthermore, even were jurisdiction clear, settled principles of comity as well as sound judicial administration, dictate that this court refuse jurisdiction in this case." (*Infra*, p. A-17.)

Noting that the receivership in question was not a traditional court-created equity receivership, but an "executive receivership" created by Illinois law (Ill. Rev. Stats., ch. 32, § 921, 1969), the court said:

> * * * And, while FSLIC is a federal agency authorized to litigate *its claims* in a federal court, it is here as a state appointed receiver in a state court receivership subject to the supervision of a state court Chancellor. In short, while FSLIC as a federal agency may have Congressional authority to prosecute its claims in federal court, *I do not believe* that this power extends to the facts of this case wherein *FSLIC, having sought and obtained appointment as receiver in a state court receivership, can now bring all the many ancillary claims of the receivership in this court contrary to the express desires of the court wherein the receivership is pending.* I particularly note that FSLIC has advised the court and counsel that it intends to file still another claim in this court for post-default interest. *This proposed case is to be brought*

by FSLIC as a government agency and will be against FSLIC as state court receiver. Such a claim brought against the estate in receivership would clearly be in further contravention of the state court injunction. This type of controversy between our courts is not what Congress intended when it authorized FSLIC to bring suit in federal court (12 U. S. C. § 1730(k); 28 U. S. C. § 451) and to act as receiver in state court liquidations (12 U. S. C. § 1729). I note particularly that FSLIC has stated, in this case as well as in support of its motion to dismiss the *Katin* case, that this "fraud" and "mismanagement" case is brought in its capacity as receiver and on behalf of the association and its shareholders. Section 1730, subsection (k), above cited, specifically provides:

> "That any action, suit or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States."

By its own description this is such an action, brought not in its capacity as a federal corporation, but in its capacity as receiver, prosecuting rights of the association under state law. *There is thus no statutory basis for the federal jurisdiction it demands I exercise.* (*Infra*, pp. A-18, 19) Emphasis added.

The Opinion of the Court of Appeals.

The Court of Appeals reversed the order of dismissal (*Infra*, p. A-6) in a *per curiam* opinion holding that the issues raised were disposed of in *FSLIC* v. *Krueger*, 435 *F. 2d 633* (C. A. 7, 1970). The Court said that the district court clearly had jurisdiction under 28 U. S. C. § 1345 since the FSLIC qualifies as a federal agency authorized to sue under 28 U. S. C. § 1725(c)(4) and 28 U. S. C. § 1730 (k)(1).

It held that the doctrine of abstention is an "extraordinary" and "narrow" one and, for the same reasons advanced in *Krueger*, said "FSLIC's suit would in no way interfere with the state's administration of the receivership." (*Infra*, p. A-5.) Moreover, it said it found no support for an approach that bases a determination of interference with the state court proceedings on "considerations gleaned from the settlement negotiations . . . [s]uch pretrial discussions . . . cannot furnish the basis for a determination that federal-court action would interfere with the state court receivership proceedings. To determine interference on that ground would impermissibly prejudice the right of a party to choose a forum, otherwise available to him, in which to institute an action involving substantive issues different from those pending in another court." (*Infra*, p. A-6.)

REASONS FOR GRANTING THE WRIT.

I.

The case presents an important issue as to the interpretation of a federal jurisdictional statute.

II.

The case involves issues having to do with a deliberately-constructed balance between federal and state agencies and courts in the regulation of federal savings and loan associations, on one hand, and state associations on the other. The decision of the Court of Appeals has upset that balance holding, in effect, that when the FSLIC sues in its capacity as a receiver of a state-chartered association federal jurisdiction lies for the reason alone that the FSLIC is a federal agency.

III.

The implications of the resolution of the above issues affect the jurisdiction of the federal courts to hear cases brought by the FDIC in its capacity as receiver for state banks enforcing rights pursuant to state law under provisions almost identical to those governing the FSLIC on which there has been a conflict of opinion in the lower federal courts.

The language of 1730(k)(1) embodies what Congress was seeking to do and is wholly consistent with the functions of the FSLIC as it oversees *federal* savings and loan associations on one hand and *state* associations on the other. The holding of the Court of Appeals damages the symmetry between the powers and functions of the Federal Deposit Insurance Corporation (FDIC) and those of the FSLIC.

One year before deciding the *Katin* case the Seventh Circuit handed down a decision also brought by the FSLIC arising out of a defunct state-chartered savings and loan association, *FSLIC* v. *Krueger*, 435 F. 2d 633, 636 (C. A. 7, 1970), in which the Court held "that subsections (B) and (C) of section 1730(k)(1), including the proviso, relate solely to removal proceedings from state courts in actions wherein the corporation has been made a party. See *Federal Savings and Loan Insurance Corporation* v. *Quinn*, 419 F. 2d 1014 (7th Cir. 1969)."

The Court of Appeals in *Katin* concluded that its holding in *Krueger* was dispositive: "We reaffirm *Krueger*. We hold that the district court clearly had jurisdiction under 28 U. S. C. § 1345 since FSLIC qualifies as a federal agency authorized to sue under 28 [*sic*] U. S. C. § 1725(c)(4) and 28 [sic] U. S. C. 1730(k)(1)."[3] *Infra*, p. A-4. These quotations from *Krueger* and *Katin* on the jurisdiction of the district courts when the FSLIC sues in its capacity as receiver of a state-chartered savings and loan association

3. The slip opinion of the Court of Appeals inadvertently cites sections 1725 and 1730(k)(1) as part of Title 28 rather than Title 12. This has been called to the attention of the Clerk for correction before the opinion is published in the *Federal Reporter*.

exhaust the analysis of the Court of Appeals on this important question. The construction given to this section by the Court of Appeals cannot be squared with the section read as a whole or with the manifestly clear intent of Congress.

The upshot of the holding in *Katin* is that, because the FSLIC is an agency under 28 U. S. C. § 451,[4] federal jurisdiction attaches, without more, even in those cases where FSLIC sues in its capacity as a receiver for a state-chartered savings and loan association. Thus, according to the Court of Appeals, one need not look beyond subsection (A) of 1730(k)(1) to resolve the issue.

Senate Report 1482 recommending passage of this subsection and other amendments to the Act in 1966 expressed with extraordinary clarity the deep concern Congress had about preserving the dual state-federal banking system:

> DUAL FINANCIAL SYSTEMS.
>
> The committee was concerned with the effect of this bill upon the dual banking system and the dual savings and loan system, each consisting of nationally chartered institutions and State-chartered institutions, with the majority of the State-chartered institutions having the benefit of Federal insurance and many of them the benefit of membership in either the Federal Reserve System or the Federal Home Loan Bank System. The committee did not wish to take any action which would do violence to the balance between State and Federal functions and responsibilities which un-

4. Section 451, Title 28 U. S. C. in pertinent part reads as follows:

> The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

derlies the dual banking system and the dual savings and loan system. On the contrary, the committee was in full agreement with the statement made by the chairman in his remarks before the National Association of Supervisors of State Banks at Williamsburg, Va., quoted in the hearings:

> The duties and powers of the Federal Reserve Board and the FDIC are broad and sweeping. They must be in order to carry out their functions. But neither they nor the State member and insured banks nor the State bank supervisors should ever forget for one moment that the State banks are chartered by the States, and are operated under State laws, and are responsible first and foremost to the officials of the States which created them.

Accordingly, the committee endorsed the proposal that in any case involving a State bank or a State savings and loan association (except for the virtually routine suspensions and removals based on charges or convictions for a felony involving dishonesty or breach of trust), the appropriate State supervisory authority must be notified and must be given an opportunity, during a reasonable time under the circumstances, to take effective corrective action—or to convince the Federal agency it is mistaken if the State supervisory authority thinks this is the case.

In addition to the protection against arbitrary and oppressive action which this provides for the benefit of the institutions and individuals affected, this provision constitutes a significant recognition in Federal statutes of the importance of the powers and responsibilities of the State supervisory authorities in our dual financial systems.

The committee considers that the bill emphasizes the role of the State chartering and supervisory authorities, and in no way lessens the status of these State authorities. (1966 U. S. Code & Admin. News, p. 3538-39.)

In *FSLIC* v. *Fielding*, 309 F. Supp. 1146 (D. C. D. Nev., 1969), the FSLIC brought an action acquired through an *assignment* from a state savings and loan association against its officers, directors and others alleging a conspiracy to inflate the price of certain stock, breaching their duty of care, seeking restitution and manipulating the stock market. The court commented that the legislative history, the provisions of the statute and the nature of the FSLIC's functional obligations indicated unequivocally that the FSLIC had no independent power to sue. "It sues, if at all, insofar as injuries to an insured are concerned, only as an assignee or subrogee of its insured. It has no independent right not to be injured by fraud perpetrated upon its insured and therefore it cannot sue in tort under a law of the United States as intended by 28 U. S. C. § 1331 . . . The federal government is, in this case, attempting to regulate the relations of state citizens with a corporation created under a state charter. Thus, there are involved not only the interest in preserving the dual banking system in the United States but an interest in a proper balance in federal relations vis-a-vis the states . . . The Congressional reports repeatedly emphasized the importance of the division of regulatory power between the national and state governments. The purpose of the enforcement provisions is to quickly stop fraudulent practices, not to affirmatively recover for them." 309 F. Supp. at 1149. After setting out the full text of section 1730(k)(1), as amended, the court sustained its jurisdiction only because the FSLIC was *not* suing in its capacity as a conservator, receiver or other legal custodian of an insured state-chartered institution. "It is apparent that Congress intended that this Court would have jurisdiction in this action if plaintiff does not fall within the proviso limiting federal question jurisdiction." 309 F. Supp. at 1150.

The present language of section 1730(k)(1) is virtually identical to the comparable provisions governing the Federal Deposit Insurance Corporation (FDIC) in its powers over banks. Thus, the issue raised by this petition gains added significance on the question of the jurisdiction of the district courts when the FDIC is acting as a receiver for a state-chartered bank. Before the amendment in 1966, 12 U. S. C. § 1819, defined the powers of the FDIC in language almost identical to the current provisions governing both the FDIC and the FSLIC. The removal provision added in 1966 reads: "... and the Corporation [FDIC] may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district or division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect . . ." 12 U. S. C. § 1819 (Fourth).

Before the amendment of 12 U. S. C. § 1819 (Fourth) which added the removal provision, the Court of Appeals for the Tenth Circuit said "Congress thus has authorized the F. D. I. C. to act simultaneously in the dual capacity of a federal insurer and as a state receiver and has discerningly provided for federal jurisdiction of claims against it as a federal insuror, *while denying federal jurisdiction over claims arising out of its activities as a state agent.*" *Freeling* v. *Sebring*, 296 F. 2d 244, 245 (C. A. 10, 1961) Emphasis added. Thus, the court construed the proviso as limiting federal jurisdiction to those cases where the FDIC was suing in its individual capacity as a federal insurer and not when it was acting as a receiver of a state-chartered bank. Assuming this construction to be correct, it is difficult to accept the statement of the Seventh Circuit in *Krueger*, and reaffirmed in *Katin*, that not only do subsections (B) and (C) relate solely to removal but the proviso as well.

The holding of the Court of Appeals in *Katin* is that for the reason alone the plaintiff is the FSLIC, a federal agency, the district court was vested with jurisdiction. If this is correct reading of section 1730(k)(1) then the rest of the section is meaningless when applied to the FSLIC suing as a receiver for a state-chartered savings and loan association. Both the structure of the section and the intent of Congress commands that when the FSLIC is suing in its capacity as receiver for a state institution its federal agency status does not empower it to go to the federal courts.

The status of the FSLIC as the receiver for Apollo Savings arises from Illinois law—not federal law. *Illinois* law permits the Commissioner of Savings and Loan Associations to appoint the FSLIC as receiver— ". . . he may appoint the insurance corporation or its nominee as such receiver or as a co-receiver . . ." Ill. Rev. Stats., ch. 32, § 921, 1969.

The federal statutory scheme cannot reasonably be read to mean that when a federal agency is made a receiver pursuant to a *state* statute appointed by a *state* official that the federal courts are perforce thrown open for the reason alone that it happens to be a federal agency which has taken over the receivership.

The Court of Appeals decision thus expands federal jurisdiction into areas of state law which the history of Congressional enactments respecting regulation of financial institutions clearly shows Congress intended to reserve solely to state control. The language of the proviso to §§ 1730(k)(1) and 1819 shows on its face that Congress, in limiting federal court jurisdiction over certain suits to which the FSLIC and the FDIC are parties, was concerned about (1) *the non-federal capacity* in which the corporations were acting and (2) *the non-federal nature of the*

issues involved in the suit. The Seventh Circuit has completely ignored Congressional concern about the capacity in which the FSLIC is acting in this case. The inevitable effect of its decision must be to greatly discourage state authorities from appointing the FSLIC receiver of its state-chartered institutions lest, by so doing, they cede even further control of their institutions to federal regulatory agencies.

CONCLUSION.

Petitioners respectfully request that for the foregoing reasons this petition for a writ of certiorari be granted.

Respectfully submitted,

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February ____, 1972.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

September Term, 1971 — September Session, 1971

No. 18910

ERNEST KATIN, ET AL.,
Plaintiffs,

vs.

APOLLO SAVINGS, ET AL.,
Defendants,

and

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, Receiver of Apollo Savings,
Plaintiff-Appellant,

vs.

EDWARD P. KELLY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 68 C 808 and 69 C 2232

WILLIAM J. CAMPBELL, *Judge*

December 8, 1971

Before SWYGERT, *Chief Judge*, CUMMINGS and SPRECHER, *Circuit Judges.*

PER CURIAM. This is an appeal from an order of the district court dismissing plaintiff's complaint on two grounds: that federal jurisdiction was lacking, and alternatively, that the federal abstention doctrine required

dismissal without prejudice to pending proceedings in state court. *Katin* v. *Apollo Savings*, 318 F. Supp. 1055 (N. D. Ill. 1970).

On April 26, 1968 the Commissioner of Savings and Loan Associations for the State of Illinois took custody of Apollo Savings pursuant to the Illinois Savings and Loan Act (Ill. Rev. Stat., ch. 32, § 848) when Apollo Savings found itself in serious financial difficulty. The Commissioner appointed an interim receiver. Thereafter a liquidation proceeding was ordered by the Circuit Court of Cook County pursuant to Ill. Rev. Stat., ch. 32, § 922. On September 30, 1968 the interim receiver resigned and the Commissioner appointed the Federal Savings and Loan Corporation ("FSLIC") to serve as receiver.

On May 3, 1968 a complaint was filed in the federal district court by one Katin and certain other depositor-shareholders of Apollo Savings charging the association and its directors with acts of fraud and mismanagement in violation of the federal securities laws and the Illinois common law. The plaintiffs sought the recovery of dividends from the date the last dividends were paid by Apollo to the date each depositor received his principal from the insurer, FSLIC, and, additionally, recovery of the uninsured portions of their accounts.

On October 29, 1968 FSLIC filed a complaint in the district court which sought substantial money damages from former officers and directors of Apollo Savings and others having transactions with the association. The complaint charged the defendants with acts of civil conspiracy, fraud, and mismanagement in violation of standards of conduct established by 18 U. S. C. § 657 (misapplication of funds of an association insured by FSLIC), 18 U. S. C. § 1001 (false statements to an agency of the United States), 18 U. S. C. § 1006 (conflicts of interest within, and false statements to, an association insured by FSLIC), 18 U. S. C.

§ 1008 (false statements to FSLIC), and in violation of the common law of Illinois. FSLIC brought the action in the capacity of a United States Government agency duly appointed to be the receiver of Apollo Savings.[1]

On April 22, 1970 following the filing of an amended complaint by FSLIC, the answers of most defendants, and the cross-claim of one defendant, the case was consolidated with the earlier case brought by certain depositor-sharholders of Apollo. Pretrial conferences ensued during which time alternative settlements were proposed. No settlement was forthcoming and on September 24, 1970 the district court entered orders dismissing these actions without prejudice to plaintiffs' rights to reassert their claims in the state court where the receivership is pending. FSLIC appeals from the dismissal of its action instituted in the district court.[2]

The issues raised here were disposed of in a recent opinion of this court. *FSLIC* v. *Krueger*, 435 F. 2d 633 (7th Cir. 1970). In *Krueger*, FSLIC sued as a United States Government agency serving as receiver for the Lawn Savings and Loan Association. The complaint alleged a conspiracy to defraud the association in violation of the standards of conduct required by various federal statutes. Liquidation proceedings involving the Lawn Savings and Loan Association were pending in state court. This court nonetheless reversed the district court's dismissal order, holding that the district court had jurisdiction to entertain the action and was not authorized to decline to exercise its jurisdiction under the federal abstention doctrine. De-

1. FSLIC also brought the action as a United States Government agency which has paid its insurance obligation to Apollo's depositors and is subrogated to their rights. Since jurisdiction for this action is found in FSLIC's capacity as receiver, we need not decide this jurisdictional claim.

2. No appeal was taken from the dismissal of the complaint brought by the depositor-shareholders.

fendants here invite the court to reconsider that holding or to distinguish *Krueger* from the instant case. We reaffirm *Krueger*. We hold that the district court clearly had jurisdiction under 28 U. S. C. § 1345 since FSLIC qualifies as a federal agency authorized to sue under 28 U. S. C. § 1725(c)(4) and 28 U. S. C. § 1730(k)(1). *FSLIC* v. *Krueger*, *supra* at 635-36.[3] Furthermore, we find no merit in the defendants' claim that circumstances in this case—that were absent in *Krueger*—justify the district court's decision to abstain from entertaining the action.

The standard for determining when abstention is permissible has been outlined in *Allegheny County* v. *Mashuda Co.*, 360 U. S. 185, 188-89 (1959), cited approvingly in *Krueger*, *supra* at 637: The doctrine of abstention is an "extrordinary" and "narrow" exception to the duty of a federal court to hear a case to which Congress has extended its jurisdiction. The jurtification offered for abstention in the instant case is "on grounds of comity with the States when the exercise of jurisdiction by the federal court would disrupt a state administrative process." *Allegheny County* v. *Mashuda Co.*, *supra* at 189. No such interference was found in *Krueger* where the court after analyzing the state and federal actions, and evaluating the respective statutory schemes under which they were proceeding; found that: "[T]he receivership is an in rem or quasi in rem proceed-

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3. Defendants argue that FSLIC has no authority as receiver to bring this kind of action either by state statute or by order of the state court in which liquidation proceedings are pending. We disagree. We interpret the Illinois Statute under which FSLIC was appointed as receiver as authorizing suits to recapture assets: the receiver under Ill. Rev. Stat. ch. 32, § 921 is authorized to take possession of "assets of every description" which we take to mean causes of action, such as suits to collect outstanding claims, or, as in the instant case, to recapture assets. Furthermore, specific court authorization is unnecessary where FSLIC is an administrative receiver appointed by the Commissioner of Savings and Loan Associations, and not an officer of the court. *People ex rel. Knight* v. *O'Brien*, 40 Ill. 2d 354, 240 N. E. 2d 686 (1968).

ing, concerned primarily with the liquidation and distribution of the assets of the association. . . . [T]he suit brought by FSLIC in the district court is a plenary, in personam action seeking to recapture assets allegedly siphoned off through fraudulent conduct." *FSLIC* v. *Krueger*, *supra* at 636. Since the cause of action in the instant case is virtually identical to that in Krueger,[4] we draw the same conclusion: FSLIC's suit would in no way interfere with the state's administration of the receivership.[5]

Defendants' principal contention is that this case is distinguishable from *Krueger*, not because of the substantive issues in the litigation as revealed in the pleadings, but because of the "basic" or "underlying" issues revealed by the parties during the pretrial conferences. The lower court determined from the pretrial conferences that the "basic" issue of the case was not fraud or mismanagement, as was specifically charged in the complaint, but the "proper disposition of potential surplus." *Katin* v. *Apollo Savings*, *supra* at 1057. We find no support for an approach that bases the determination of interference on considerations gleaned from the settlement negotiations.

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4. The instant case is a suit brought by the receiver, FSLIC, for violations of the standards of conduct established by 18 U. S. C. §§ 657, 1001, 1006 and 1008. In *FSLIC* v. *Krueger*, FSLIC, as receiver, charged violations of 12 C. F. R. § 563.9-3 and the standards of conduct prescribed by 18 U. S. C. §§ 657 and 1006.

5. Defendants maintain that abstention dictates dismissal of this action because of the possibility of counterclaims against FSLIC, which would directly contravene the state court's order restraining any attempt to obtain a judgment against Apollo or property in the custody of the FSLIC without further order of the state court. No such counterclaim was filed in the instant case. In any event, we cannot interpret the state statutory scheme so broadly as to foreclose a federal cause of action provided for by Congress in 12 U. S. C. § 1730(k)(1). That section provides jurisdiction in suits in which FSLIC is plaintiff but denies jurisdiction where FSLIC as defendant removes the action to federal court. *FSLIC* v. *Krueger*, *supra*.

Pretrial settlement discussions are informal sessions in which the parties discuss the issues, and frequently, bargain with one another. In the instant case, no formal stipulations emerged as a result of these discussions, nor a settlement of the case. Actions pending in state and federal courts may be discussed at the same conference and even settled simultaneously where the parties to the actions are the same even though the causes of action discussed may not be reconcilable or even related on the merits. Such pretrial discussions, however, cannot furnish the basis for a determination that the federal court action would interfere with the state court receivership proceedings. To determine interference on that ground would impermissibly prejudice the right of a party to choose a forum, otherwise available to him, in which to institute an action involving substantive issues different from those pending in another court.

The order of dismissal is reversed.

UNITED STATES DISTRICT COURT,
N. D. Illinois, E. D.

Sept. 24, 1970.

ERNEST KATIN et al., *Plaintiffs,*

vs.

APOLLO SAVINGS et al., *Defendants.*

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, Receiver of Apollo Savings, a corporation, *Plaintiff,*

vs.

EDWARD P. KELLY et al., *Defendants.*

Nos. 68 C 808, 69 C 2232.

MEMORANDUM AND ORDER

CAMPBELL, *District Judge.*

This action arises out of the liquidation of an Illinois Savings and Loan Association, Apollo Savings ("Apollo"). Plaintiff, Federal Savings and Loan Insurance Corporation ("FSLIC") is acting as Receiver of Apollo in a liquidation proceeding presently pending before the Circuit Court of Cook County. That receivership proceeding commenced on April 26, 1968 when the Commissioner of Savings and Loan Associations for the State of Illinois appointed a receiver to take custody of and to liquidate Apollo pursuant to the Illinois Savings and Loan Act. (Ill. Rev. Stat. C. 32, par. 921). On May 2, 1968, the Attorney General of the State of Illinois, pursuant to the provisions of the Illinois Savings and Loan Act, filed a statutory complaint in the Circuit Court of Cook County, Chancery Division, seeking the liquidation and dissolution of Apollo. The cause was assigned to the Honorable Donald J. O'Brien, Presiding Judge of the Chancery Division of that court, and at the request of the Illinois Attorney General, Judge O'Brien entered a Decree ordering the liquidation of Apollo and directing its receiver to take custody and control of its assets and records for the purpose of liquidating the Association. At the request of the Attorney General, the Decree further, "restrained all persons from obtaining or attempting to obtain any judgment, attachment, encumbrance, or other like lien against or upon said association or any of its assets * * * while the same are in possession and control of said receiver or until further order" of the court.

The Decree also provided that the state court retained jurisdiction of the cause, "for the purpose of granting such

other and further relief as said association, its members, said receiver, creditors, debtors, the public or others who apply to this court may require and in the judgment of this court merit."

On September 30, 1968, the then acting receiver resigned and plaintiff FSLIC was appointed receiver. It is still acting in that capacity.

LITIGATION IN THIS COURT

(A) Katin v. Apollo.

On May 3, 1968, certan depositors-shareholders of Apollo brought an action in this court against Apollo and its Directors alleging various acts of mismanagement and violations of state law relative to the management of Savings and Loan Associations. Katin, et al. v. Apollo, et al., 68 C 808. Plaintiffs in *Katin* contend that these actions constituted a violation of the Securities Act of 1933 and the Securities Exchange Act of 1934. Basically, the relief sought is an award to each depositor-shareholder of "interest" or "dividends" for a period commencing when the last "interest" or "dividend" was paid and continuing up to the time each depositor was paid his principal by the FSLIC.[1]

In moving to dismiss the *Katin* case, FSLIC, as receiver of Apollo, stated that "stripped to its essentials", the *Katin* case is a "classic case of corporate mismanagement which can only be asserted by Apollo Savings, through its receiver."

FSLIC also argued that these claims alleging corporate mismanagement, arise under state law and are "cognizable under state law, but not under the (Securities) Act," citing Mutual Shares Corp. v. Genesco, Inc., 384 F. 2d 540, 546 (2nd Cir., 1967).

The initial filing of the *Katin* complaint was followed by numerous motions by the many defendants; by the filing of an amended complaint by plaintiffs; and finally, by the filing of this case, FSLIC v. Kelly et al.

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1. The *Katin* plaintiffs also seek recovery for the uninsured portions of accounts exceeding $15,000 at the time Apollo was closed.

(B) FSLIC v. Kelly.

This case, a civil conspiracy, fraud and corporate mismanagement case, was brought by FSLIC against certain officers and directors of Apollo and certain other persons having major transactions with Apollo. It contains many of the allegations of corporate mismanagement contained in the *Katin* case. It is allegedly brought by FSLIC in its capacity as the state court receiver of Apollo and as an insurer subrogee. The only basis for federal court jurisdiction is the fact that FSLIC is a federal agency authorized to bring suit in federal court. See Aeron Investments, Inc. v. Federal Savings and Loan Insurance Corporation, 464 F. 2d 236 (9th Cir. 1966).

The original complaint was filed October 29, 1969, and the amended complaint January 5, 1970. One defendant later filed a cross-claim. By April 22, 1970, most of the defendants had responded by answer or motion. At that time I ordered that the two cases (Katin v. Apollo and FSLIC v. Kelly) be consolidated for pretrial discovery and trial. I also advised counsel that I was considering the feasibility of proceeding with this cause under the enlightened and accelerated procedures established for protracted cases by the Judicial Conference in its Manual for Complex and Multidistrict Litigation.

In my review of the many pleadings filed by the various parties, I thought it clear that this Association, though properly in custody of the state, was not in the sorry financial condition of others we have dealt with. On the contrary, my first reaction to the issues in this case was that it appeared that here the dispute related to the proper disposition of potential surplus. Specifically, the plaintiffs in *Katin* argued that they were entitled to a first claim to the "remains" of the estate of the Association as their "loss of bargain", whether it be legally defined as dividends or interest, for the last six months of the Association's opera-

tion; certain officers and directors, generally referred to as the "Kelly interests" argued that any surplus should go to the owners of permanent reserve stock, 80 percent of which were owned by the Kelly interests; and FSLIC argued that any surplus must first go to pay "post-default interest" to the FSLIC, that is, interest on the money which FSLIC had paid to the insured depositors.

The various aspects of this case were explored in detail in pretrial conference held with all counsel in both cases. When I expressed my views as to the proper method of proceeding in this case Mr. Merrill Shepard, counsel for FSLIC,—in urging the dismissal of the *Katin* case—stated that, in his opinion the *Katin* claim belonged in the state court because, "the determination as to who would be entitled to any surplus, as among all classes of claimants would necessarily rest with the court in which the receivership (was pending) * * * the State of Illinois." Mr. Shepard also stated:

> "Judge O'Brien, who has that case, that receivership, made it quite clear during a hearing at which Mr. Kirby and I participated that that was so.
>
> Whatever happened in relation to the proceedings here, the fund from which a judgment would be made, except for possible assets of the individual defendants, would be the fund in his charge. And I believe Mr. Kirby and I both agreed with Judge O'Brien when he made that observation."

Counsel for the "Kelly interests" agreed that *Katin* should be dismissed in deference to state court proceedings and further urged that all claims including that of the receiver FSLIC should be referred to the state court.

More interesting to me at that time, however, was that all counsel suggested the possibility of settlement—a possibility I wanted to fully explore before burdening this estate with the substantial expense involved in litigation as complex as this. It appeared to me that settlement would

certainly serve the best interests of all depositors and the federal insurer, FSLIC. Accordingly, we agreed that separate pretrial conferences would be held with the various parties and the court would work closely with counsel for FSLIC in an attempt to settle each of the many claims presented.

At the outset of the settlement negotiations, I expressed my concern to counsel for FSLIC that any steps we take toward settlement must be consistent with the proceedings in the state court, as it is that court that has the ultimate responsibility to supervise the administration of this receivership and approve any settlement we might reach in this court. I was assured by counsel for FSLIC (as the state court receiver) that this case was instituted with the full knowledge and approval of Judge O'Brien—and with that assurance settlement negotiations commenced.

After numerous pretrial conferences with the FSLIC and the Kelly interests, tentative agreement was reached on that aspect of the case. The parties agreed that FSLIC would pay the Kelly interests 50 cents per share ($270,000) for their permanent reserve stock and dismiss the cases as to them. I viewed this settlement as fair to all concerned. The $270,000 would be used to pay substantial liens on the stock, so that it could be delivered free and clear to FSLIC, thus assuring it of the most substantial share of the surplus. The remainder would ultimately go to the government by way of fines I intended to impose in a criminal case pending against Edward P. Kelly.

At this time I felt it my duty to advise Judge O'Brien, the Chancellor in the state court proceeding, of our settlement negotiations as it was he who had overall responsibility for the receivership estate and who by virtue of that responsibility must approve the settlements we had labored so long to achieve. Upon advising Judge O'Brien of our developments, I was shocked to learn that contrary to the

representations of counsel, Judge O'Brien was not advised of this proceeding before it was filed in this court and did not approve of it having been so filed. I was further advised by Judge O'Brien that while he had every respect for our court, he felt it his responsibility to fully review the terms of any settlement before approving it particularly since he did not authorize the bringing of this case—in the first instance. And, while he did indicate tentative approval of the Kelly settlement, he did not encourage further proceedings in this court.

Parenthetically, I think it important to stress that we of this court have every respect for the ability and integrity of Judge O'Brien who served at the bar of this court as one of our most active and able trial lawyers for many years, and that I fully agree and approve of the attitude of the learned Chancellor with respect to this case. Having borne the burden of overseeing many receiverships and liquidations over the years, I fully appreciate his reluctance to act as a "rubber stamp" in approving whatever settlement we might view as in the best interests of the estate he has the duty to administer. With my own experiences in mind, I accepted and concurred in Judge O'Brien's criticism.

Simultaneous with these developments were the developments in the attempted settlement of claims against certain other individual defendants and their enterprises, collectively referred to by counsel as Grizaffi and Falcone. Grizaffi and Falcone were contractors who obtained more than four million dollars in construction loans from Apollo. The receiver contends that these defendants, along with certain other persons, defrauded Apollo, causing losses of more than one million dollars. In our first settlement discussion the receiver demanded in settlement a sum of $750,000. Grizaffi and Falcone then advised the court that they believed they had a valid and substantial claim against

Apollo and would soon file a counterclaim. These defendants further suggested that they would accept $700,000 in settlement of their counterclaim.

The proposed counterclaim of Grizaffi and Falcone indicated not only that settlement negotiations might be much less fruitful than originally anticipated or at least more complex and thereby subject to perhaps complete *de novo* review by the state court Chancellor if these negotiations resulted in settlement, but more importantly, the counterclaim if presented in this court, would be in direct contravention of the state court injunction, "restraining all persons from obtaining or attempting to obtain any judgment * * * or like lien against or upon said association * * *". (Similarly, the FSLIC, in its corporate capacity—as opposed to its capacity as receiver—indicates that it intends to file a claim against the Association for interest on the insurance payments it has made to depositors.)

For the many reasons explained here, I advised counsel for the FSLIC that it appeared to me that there was no alternative but to reconsider the motions of certain defendants to dismiss this cause or to dismiss on my own motion, without prejudice to the rights of FSLIC and all other parties to prosecute their claims in the state court where the receivership was pending as ancillary proceedings in that receivership qualifying for immediate relief. Subsequently, counsel for FSLIC filed a brief expressing their reasons in support of their position that this action should not be dismissed. I have reviewed the arguments advanced in this brief and for the reasons I have stated and others I shall further state, find them totally unconvincing.

First, it should be stressed that there is no question but that all of the relief sought here could be obtained in the state court proceedings. In fact, my experience in similar cases convinces me that the most expeditious manner of

prosecuting claims of this nature,—i.e., all claims on behalf of or against the association in receivership—is to litigate these claims as ancillary to the receivership case and in the court where the receivership is pending. In Tcherepnin v. Franz, 316 F. Supp. 714 (N. D. Ill. 1970), a case involving the liquidation of another savings and loan association of the State of Illinois (City Savings Association) I specifically instructed the receivers of the Association that all claims on behalf of the Association were to be litigated in this court as ancillary to the case in chief, and that, to the extent possible, claims against the Association were to be brought here. In accomplishing this important objective the judges of our state court, in a most gracious application of the principles of comity, have shown my receivers and our court every consideration. As recently as September 10, 1970, The Honorable Nicholas J. Bua of the Circuit Court of Cook County dismissed the case of Andover Advertising Company v. City Savings Association (67 L. 2949), when he was advised of my desire to litigate all claims against the Association in this court. Courtesies, based on comity, such as that extended by Judge Bua would not be so readily extended were it not for the fact that we judges of this court have over the years promoted the cooperative spirit based on mutual respect that presently exists between our courts, whether it be in the name of federalism, comity or simple common sense. Against this setting, I consider the legal arguments presented by FSLIC.

FSLIC first argues that this court has a duty to adjudicate any cause brought within its jurisdiction and that "deference to a state court is an extraordinary and narrow exception to this duty * * * justified only in exceptional circumstances". To meet these extraordinary circumstances, FSLIC argues that each of the following tests be met: (1) there must be uncertainty of state law; (2) state court adjudication must clearly serve an important coun-

tervailing interest, such as, a federal constitutional issue that may be mooted by state court determination of pertinent state law or exercise of federal jurisdiction would disrupt state administrative process or create needless friction by unnecessarily enjoining state officials from executing domestic policies. FSLIC further argues that "there is no way" a judgment or settlement in this case could disrupt or interfere with the state court receivership.

I disagree with its analysis of the law and its attempted application to the facts of this case. In my opinion the statutes relied on do not grant jurisdiction under the facts of this case. Furthermore, even were jurisdiction clear, settled principles of comity as well as sound judicial administration, dictate that this court refuse jurisdiction in this case.

For our dual court system to function properly, all needless friction between the state and federal courts must be religiously avoided. This principle is established by statute as well as by court decision. See Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers, 398 U. S. 281, 90 S. Ct. 1739, 26 L. Ed. 2d 234 (1970). As explained above, the case in chief—the receivership—was first brought in the state court by the Attorney General of Illinois under his statutory authority. Upon the motion of the Attorney General, the state court judge to whom the case was assigned enjoined prosecution of all claims against the Association, and retained jurisdiction for the purpose of granting any other and further relief the receiver may require and in the judgment of that court merit. Now, I am confronted with complex litigation which involves claims against the Association contrary to the state court injunction, and also seeks relief by the receiver—although the state court specifically retained jurisdiction to grant said relief.

I am aware that the receivership in question is not a traditional court created equity receivership, but is an ex-

ecutive receivership, under which the receiver was appointed by the Commissioner of Savings and Loan Associations (Ill. Rev. Stat. C. 32 § 921). It is still the court which has, by statute and by its own decree, entered on motion of the state's Attorney General, the overall supervisory responsibility over the estate in receivership. It is clear in this case—contrary to the representations of counsel—that the court with that authority and responsibility does not approve of the maintenance of this action. And, while FSLIC is a federal agency authorized to litigate *its claims* in a federal court, it is here as a state appointed receiver in a state court receivership subject to the supervision of a state court Chancellor. In short, while FSLIC as a federal agency may have Congressional authority to prosecute its claims in federal court, I do not believe that this power extends to the facts of this case wherein FSLIC having sought and obtained appointment as receiver in a state court receivership, can now bring all the many ancillary claims of the receivership in this court contrary to the express desires of the court wherein the receivership is pending. I particularly note that FSLIC has advised the court and counsel that it intends to file still another claim in this court for post-default interest. This proposed case is to be brought by FSLIC as a government agency and will be against FSLIC as state court receiver. Such a claim brought against the estate in receivership would clearly be in further contravention of the state court injunction. This type of controversy between our courts is not what Congress intended when it authorized FSLIC to bring suit in federal court (12 U. S. C. § 1730(k); 28 U. S. C. § 451) and to act as receiver in state court liquidations. (12 U. S. C. § 1729). I note particularly that FSLIC has stated, in this case as well as in support of its motion to dismiss the *Katin* case, that this "fraud" and "mismanagement" case is brought in its capacity as receiver and on

behalf of the association and its shareholders. Section 1730, subsection (k), above cited, specifically provides:

> "That any action, suit or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States."

By its own description this is such an action brought not in its capacity as a federal corporation, but in its capacity as receiver, prosecuting rights of the association under state law. There is thus no statutory basis for the federal jurisdiction it demands I exercise.

I believe the conclusion I reach here is also consistent with settled principles of comity between federal and state courts. The receivership is proceeding before a state court which has plenary jurisdiction over the affairs of the receivership estate. This court has, at best, only partial jurisdiction. We may litigate only portions of claims—subject to the supervision of the state court. The state court first took jurisdiction over the receivership estate. Under the Illinois Savings and Loan Act it has the responsibility to supervise the dissolution of State Savings and Loan Associations. Under settled principles best expressed by the Supreme Court in Pennsylvania v. Williams, 294 U. S. 176, 55 S. Ct. 380, 79 L. Ed. 841 (1935) federal courts are admonished not to interfere with these dissolutions, though we may have "abstract" jurisdiction over the subject matter of certain claims.

The approach I take here is similar in theory to that taken by the Supreme Court in Toucey v. New York Life Insurance Company, 314 U. S. 118, 135, 62 S. Ct. 139, 144, 86 L. Ed. 100 (1941). There Mr. Justice Frankfurter wrote:

> "* * * a line of cases begining with Hagan v. Lucas, 10 Pet. 400, 9 L. Ed. 470, holds that the court, whether federal or state, which first takes possession of a *res* withdraws the property from the reach of the other. * * * 'The rank and authority of the (federal and state) courts are equal, but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict.'"

See also, Princess Lida of Thurn and Taxis v. Thompson, — 305 U. S. 456, 466, 59 S. Ct. 275, 83 L. Ed. 285 (1939), wherein the court stated:

> "We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property. The doctrine is necessary to the harmonious cooperation of federal and state tribunals."

These principles, as expressed by the Supreme Court in *Toucey* and *Princess Linda* are sometimes said to apply to actions *in rem* only and not to actions *in personam*. Significantly, FSLIC relies on this same distinction in urging that this action not be dismissed. But this distinction does not preclude dismissal. As very recently expressed by Judge Pell, of our Court of Appeals, in Aetna State Bank v. Altheimer, 430 F. 2d 750 (1970).

> "The growth of the abstention doctrine is recognized in 1 Barron & Holtzoff-Wright, Federal Practice and Procedure § 64, 352 (1960). The doctrine is referred to by the authors as a sound development in the administration of the federal courts.
>
> The granting or denial of a stay has been held to be within the discretion of the trial court in analogous

situations. Ferguson v. Tabah, 288 F. 2d 665, 672 (2d Cir. 1961). The cases differentiate *in rem* and *in personam* actions in applying the principles here involved. More clearly, of course, the result of abstention was reached in the *in rem* cases where a state court already had custody of a *res*. A federal court must decline jurisdiction, in accord with the settled rule that the court first taking jurisdiction of a *res* may proceed to final judgment. 1 Barron & Holtzoff-Wright, Federal Practice & Procedure § 64, 351 (1960). While it seems to be well established that a federal court is not required to abate the normal *in personam* action on a plea of a pending action in a state court, nevertheless it is within the discretionary power of the district court to stay its proceedings pending the completion of state proceedings. See Ballantine Books, Inc. v. Capital Distributing Co., 302 F. 2d 17, 19 (2nd Cir. 1962). See also, Seaboard Finance Co. v. Davis, 276 F. Supp. 507, 511 (N. D. Ill. 1967)." (pp. 755-756)

In other words, in an action *in rem*, abstention is often required, whereas in actions *in personam* there is more room for the exercise of judicial descretion. I find that sound discretion here calls for dismissal. As stated in American Fidelity & Casualty Company v. Service Oil Company, 164 F. 2d 478, 480-481 (4th Cir. 1947):

> "There could be no possible justification for dragging into the federal court the litigation of the issues pending in the state court. * * *
>
> Even though the court has jurisdiction to grant the * * * relief, it should not exercise the jurisdiction 'to try a controversy by piecemeal, or to try particular issues without settling the entire controversy, or to interfere with an action which has already been instituted.'
>
> Ordinarily, the court first acquiring jurisdiction of a controversy should be allowed to proceed with it without interference from other courts under suits subsequently instituted."

See also, Brillhart v. Excess Insurance Company, 316 U. S. 491, 62 S. Ct. 1773, 86 L. Ed. 1620 (1942); and Reiter v. Illinois Nat. Cas. Co., 213 F. 2d 946 (7th Cir. 1954).

Despite these many considerations of comity, FSLIC, relying only on its predetermined opinion that this court has jurisdiction, imperiously demands that jurisdiction be exercised. As I have stated above, even were jurisdiction present, the controversy between this court and Judge O'Brien's court as counsel would engender, is unthinkable, practicing as we do in this same community and often concurrently dealing with the same subject matter.

Finally, I believe sound judicial administration also dictates dismissal of this cause. After spending many hours in extensive conferences and many other hours in preparation for these conferences and having finally reached a partial settlement of certain claims, I was advised that the state court would have to consider *de novo* the merits of any settlement I approved. In complex cases such as this, pretrial settlement negotiations are often more difficult than complete trial of less complex cases. Here, if I were to retain jurisdiction, two courts would labor with many of the same issues in the same case. This possibility is absurd. I have in the past weighed similar considerations in declaring or accepting jurisdiction. For example, in Johns-Manville Sales Corp. v. Chicago Title and Trust, 261 F. Supp. 905 (D. C. 1966), I entertained, on the theory of ancillary jurisdiction, the claim of a co-plaintiff growing out of the same facts as the case in chief, but which sought less than the jurisdictional amount. There I stated (p. 908):

> "Basically law is common sense. Paraphrasing the late Chief Justice of the United States Supreme Court, Edward Douglass White, whenever a rule of law does not make common sense it should not be followed. It is unthinkable under our present advanced state of

judicial adminstration to require the same case be tried separately in two different courts. Duplicitous expenses and an unjustifiable imposition on an already overtaxed judicial system run contrary to recent advancements in legal rules of procedure—most notably our own model Federal Rules of Civil Procedure."

Later, in Fugard v. Thierry and Layden v. Zantop, 265 F. Supp. 743, 750 (D. C. 1967), I remanded certain cases to the state court where separate but related cases were pending.

> "In reaching this decision I am fully aware that there is as yet no precedent for the application of the *Finn* [American Fire and Casualty Co. v. Finn, 341 U. S. 6, 71 S. Ct. 534, 95 L. Ed. 702] doctrine to circumstances involving plaintiffs who have initiated separate though related lawsuits in the state court.
>
> I am equally aware of the practical considerations which give support to my decision. If I denied the motion to remand and retained jurisdiction, two courts of competent jurisdiction within the same city would entertain basically the same lawsuit, that is, involving substantially the same factual and legal issues, the same attorneys, and the same parties. Costly and duplicitous pretrial preparation would also be necessary. Considering the well known and much publicized backlog of cases and the shortage of manpower on the bench and in the litigation practice field, it would be asinine to facilitate such a possibility."

Significantly, in the *Aetna State Bank* case, *supra*, Judge Pell judicially accepted similar considerations as proper in determining whether a district court should abstain in deference to state courts. Displaying the practical wisdom that has already marked his career on our Seventh Circuit Court of Appeals, the learned judge observed:

> "The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time

and effort for itself, for counsel and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance. Landis v. North American Co., 299 U. S. 248, 254, 57 S. Ct. 163, 81 L. Ed. 153 (1936). A stay pending the outcome of the litigation in another court between the same parties, involving the same or controlling issues is an acceptable means of avoiding unnecessary duplication of judicial machinery. ACF Industries, Inc. v. Guinn, 384 F. 2d 15, 19 (5th Cir. 1967)." (430 F. 2d p. 755).

For the many compelling reasons expressed herein, I can conclude only that this cause, FSLIC v. Kelly, should be dismissed without prejudice to plaintiff's right to bring the same claims in the state court where its receivership is pending. An order shall enter accordingly.

A further order shall also be entered today dismissing the case of Katin v. Apollo for the reasons urged by FSLIC, particularly, that the plaintiffs' claims should be presented in the court wherein the receivership is pending. As stated in a separate memorandum relating to the *Katin* case, this dismissal is likewise without prejudice.

MEMORANDUM AND ORDER IN NO. 68 C 808.

Plaintiffs are owners or holders of withdrawable capital accounts of Apollo Savings ("Apollo"). These shareholder-depositors bring this action against Apollo and its directors and allege, *inter alia*, certain violations of the Securities Act of 1933 and the Securities Exchange Act of 1934, as well as other allegations of fraud and mismanagement. The primary relief sought is an award of dividends on their withdrawable capital accounts for the period November 1, 1967 (when the last dividend was paid) until the date each depositor received the principal of his account from the insurer, Federal Savings and Loan Insurance Corporation. ("FSLIC"). Plaintiffs also seek an award to certain shareholders of the amounts of withdrawable capital accounts in excess of the insured amount, $15,000. One named plaintiff was the owner or holder of an account in excess of $15,000. All other named plaintiffs have recovered the full amount of their principal from the insurer.

Upon review of the issues here presented I am convinced by the arguments of the state court receiver, FSLIC, that the claims here presented for "dividends" or "interest" are not properly cognizable in this court, but may be presented in the state court where the receivership is pending and where FSLIC is acting as receiver under the supervision of the state court. See, Federal Savings & Loan Insurance Corporation v. Huttner, 401 F. 2d 58 (7th Cir. 1968); Mutual Shares Corp. v. Genesco, Inc., 384 F. 2d 540 (2nd Cir. 1967).

The claims for the uninsured portion of an account, (the amount in excess of $15,000) may present a claim cognizable in this court. Tcherepnin v. Knight, 389 U. S. 332, 88 S. Ct. 548, 19 L. Ed. 2d 564 (1967). I agree with

the arguments of FSLIC and the other defendants, however, that the present complaint does not adequately allege certain elements, most notably reliance, necessary to state a cause of action under the securities acts.

More importantly, it appears clear at this time that all claims for principal accounts in excess of the insured amount of $15,000 will be paid. These claims are apparently pending in the receivership action in the state court. In view of this fact it seems pointless to go through trial of difficult issues relating to fraud, reliance and the possible application of the statute of limitations, when payment will be forthcoming in a more painless manner in the state court receivership proceedings. If payment of these accounts is not received in a reasonable time, or if it appears said payments will not be made, plaintiffs have leave to reinstate this cause.

In all other respects this cause is dismissed without prejudice to the rights of all plaintiffs to present these same claims in the state court.

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No. 71-1112

In the Supreme Court of the United States

OCTOBER TERM, 1971

BERNARD GRIZAFFI, ET AL., PETITIONERS

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER, APOLLO SAVINGS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners are contractors who obtained more than four million dollars in construction loans from the Apollo Savings and Loan Association, which subsequently went into receivership. Pursuant to Illinois law, the Commissioner of Savings and Loan Associations for the State of Illinois appointed the Federal Savings & Loan Insurance Corporation (FSLIC) as receiver of the Apollo Savings & Loan Association. FSLIC brought this action against the petitioners and certain former officers and directors of the association to recover damages for alleged acts of civil conspiracy, fraud and mismanagement.

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The suit was filed in the United States District Court for the Northern District of Illinois while state liquidation proceedings were pending. The complaint charged the defendants with violating standards of conduct established in 18 U.S.C. 657 (misapplication of funds of an association insured by FSLIC), 18 U.S.C. 1001 (false statements to an agency of the United States), 18 U.S.C. 1006 (conflicts of interest within, and false statements to, an association insured by FSLIC), 18 U.S.C. 1008 (false statements to FSLIC), and the common law of Illinois.

The district court dismissed the complaint for lack of subject matter jurisdiction. *Katin* v. *Apollo Savings*, 318 F. Supp. 1055 (N.D. Ill.).[1] The court of appeals reversed, holding that FSLIC's claims as receiver established federal jurisdiction under 28 U.S.C. 1345 (Pet. App., pp. A1–A6).[2] That statute provides that "[e]xcept as otherwise provided by Act of Congress, the district court shall have original jurisdiction of all civil actions * * * commenced by the United States, or by any *agency* or officer thereof *expressly*

[1] The district court also held that the federal abstention doctrine required dismissal of FSLIC's complaint without prejudice to pending proceedings in state court. *Katin* v. *Apollo Savings*, 318 F. Supp. at 1061–1063. The court of appeals reversed, finding no basis for invoking the federal abstention doctrine (Pet. App., pp. A3–A6). Petitioners do not challenge the holding that abstention was improper. The complaint in *Katin* v. *Apollo Savings*, N.D. Ill., No. 68 C 808, a separate, earlier action consolidated with the instant case, was also dismissed. The plaintiffs in that case did not appeal.

[2] The court of appeals did not decide whether federal jurisdiction was established by FSLIC's claims in its capacity as successor to the rights of Apollo's depositors (Pet. App., p. A3 n.1).

authorized to sue by Act of Congress" [emphasis added]. The court of appeals determined that FSLIC qualified as a federal agency authorized to sue under 12 U.S.C. 1725(c)(4) and 12 U.S.C. 1730(k)(1).

Petitioners contend here, as they did below, that a proviso to 12 U.S.C. 1730(k)(1) precludes federal jurisdiction because FSLIC brought suit in its capacity as receiver for a state-chartered bank. The statute provides:

> Notwithstanding any other provisions of law, (A) the Corporation [FSLIC] shall be deemed to be an agency of the United States within the meaning of section 451 of Title 28; (B) any civil action, suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and (C) the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect: *Provided,* That any action, suit or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other

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[1] The term "agency" is defined in 28 U.S.C. 451 as including "any corporation in which the United States has a proprietary interest." 12 U.S.C. 1730(k)(1)(A) states that FSLIC "shall be deemed to be an agency of the United States" within the meaning of 28 U.S.C. 451. 12 U.S.C. 1725(c)(4) expressly authorizes the FSLIC "[t]o sue and be sued * * * in any court of competent jurisdiction in the United States * * *."

> legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States. * * *

The court of appeals held that the proviso in 12 U.S.C. 1730(k)(1) related solely to removal of suits commenced in state courts, which named FSLIC as a party, and that the proviso does not limit the jurisdiction conferred by 28 U.S.C. 1345 over "all civil actions * * * commenced by the United States, or any agency or officer thereof expressly authorized to sue by Act of Congress."

1. The decision of the court of appeals is correct, as a brief analysis of the statutory provisions relating to removal proceedings indicates. A party in an action in a state court may remove the action to a district court only in those cases in which the district court could have exercised original jurisdiction. 28 U.S.C. 1441. Where an agency such as FSLIC is named a party in a state proceeding and the matter in controversy does not "arise under the Constitution, laws, or treaties of the United States" or involves an amount less than $10,000, removal to a district court would not normally be possible (28 U.S.C. 1331). By providing that such actions "shall be deemed to arise under the laws of the United States" and that jurisdiction may be taken without regard to the amount in controversy, 12 U.S.C. 1730(k)(1) automatically

brings the proceedings within the provisions of 28 U.S.C. 1331.[4]

The proviso in 12 U.S.C. 1730(k)(1) merely creates an exception to this "automatic jurisdiction" rule by declaring that a proceeding in which FSLIC is a party solely in its capacity as a receiver of a state chartered institution shall "not be deemed to arise under the laws of the United States." The present case, however, involves a suit commenced by an agency of the United States and jurisdiction arises solely by virtue of that fact under 28 U.S.C. 1345.[5] There-

[4] 28 U.S.C. 1345 could not supply the jurisdictional predicate for removal in such a case because it is applicable only to suits "commenced by the United States or by any agency".

[5] *Freeling* v. *Sebring*, 296 F. 2d 244, 245 (C.A. 10), on which petitioners rely (Pet. 16), is not in conflict with the decision below. That case involved the construction of 12 U.S.C. 1819, Fourth, the analogous statute defining jurisdiction in cases involving the Federal Deposit Insurance Corporation. Unlike 12 U.S.C. 1730(k)(1)(A), the statute in *Freeling* did not contain a provision declaring the FDIC to be an "agency" of the United States, and jurisdiction, therefore, could not be predicated on 28 U.S.C. 1345. The Senate Report on 12 U.S.C. 1730(k)(1) expressly stated that clause (A) would "make clear that the Corporation is an agency of the United States for purposes of title 28 of the United States Code" and that there was no provision comparable to clause (A) in the analogous statutes relating to the Federal Deposit Insurance Corporation (12 U.S.C. 1819). S. Rep. 1482, 89th Cong., 2d Sess., p. 19. Petitioners' reliance on that portion of the Senate Report expressing concern for the preservation of the dual federal-state banking system, S. Rep. 1482, 89th Cong., 2d Sess., p. 7, is misplaced. That part of the report relates to 12 U.S.C. 1730(o), which provides that state supervisory authorities must be given an opportunity to remedy unsound state banking practices before FSLIC moved to correct such practices under 12 U.S.C. 1730 (c), (f)(1), or (g).

fore, even if the proviso applies to this case and the action is "not deemed to arise under the laws of the United States," the district court had jurisdiction under 28 U.S.C. 1345."

2. The proviso in 12 U.S.C. 1730(k)(1) has no application to the instant case even if it were otherwise applicable to defeat jurisdiction over a suit commenced by FSLIC in its capacity as a receiver of a State chartered institution. By its terms, the proviso apples only to a case where FSLIC is a party in a representative capacity and the case "involves only the rights or obligations of investors, creditors, stockholders, and such institution [on behalf of which the suit is brought] under *State law*" (emphasis added). The complaint in the present case does not involve "only" rights "under State law." The complaint charged petitioners with violation of four separate federal statutes in addition to the common law of Illinois. Since this case involves issues under federal law, the proviso cannot operate to defeat the jurisdiction of the district court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1972.

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[6] *Federal Savings & Loan Insurance Corp.* v. *Fielding*, 309 F. Supp. 1146 (D. Nev), which petitioners cite (Pet. 15), sustained jurisdiction over a suit brought by FSLIC. While there is some language in the opinion supporting petitioners' argument, it was not necessary to the decision.

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